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NO. 36751-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WASHINGTON STATE GAMBLING COMISSION,

Appellant,

v.

ZDI GAMING, INC.

Respondent/Cross Appellant.

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**RESPONDENT'S BRIEF
AND CROSS APPEAL**

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INTRODUCTION

ZDI asks this Court to affirm that pull tab prizes may be redeemed with a cash card, which enhances regulatory control over the social pastime authorized by the Legislature. ZDI should recover fees and costs consistent with the policy objectives of the Equal Access to Justice Act. The calculation should include costs and fees attributable to the State's erroneous motion to dismiss, which violated ZDI's right to trial in Pierce County.

I. ASSIGNMENTS OF ERROR

1. Pierce County Superior Court erred when it heard the State's

motion to dismiss.
2. Thurston County Superior Court erred when it did not affirm the Administrative Law Judge's ruling that the ZDI VIP was not a "gambling device."
3. Thurston County Superior Court erred when it limited the calculation of attorney's fees to an hourly rate of \$150.00.
4. Thurston County Superior Court erred when it did not award fees and costs to ZDI for defending the State's erroneous motion to dismiss and for ZDI's motion to supplement the pull tab dispenser.

5. Thurston County Superior Court erred when it limited ZDI's award of fees and costs to less than \$25,000.00.

6. Thurston County Superior Court erred in failing to fully supplement the record.

II. ISSUES ON REVIEW

1. Does the Washington State Gambling Commission (the "Commission") have "plenary" power to interpret the meaning of words it has not defined when the words are not ambiguous?

2. May the Commission prohibit technology that improves regulatory control of a gambling activity protected by the Legislature?

3. Can the State's arguments on appeal support a Commission order that lacks any justification in the record to support the ruling?

4. May the Commission approve cash cards to purchase pull tabs and redeem prizes, but prohibit ZDI from redeeming the pull tab prizes on the card automatically at the dispenser?

5. Can a rule adopted by the Commission in retaliation for ZDI asserting its rights moot this appeal when the rule was adopted in violation of the Open Public Meetings Act and the Administrative Procedure Act?

6. Should ZDI recover in full attorney's fees and costs under the Equal Access to Justice Act and on appeal?

III. FACTS

The Findings of Fact adopted by the trial court are essentially those of the Commission. CP 1025-1031; AR 408-415. ZDI does not object to the findings, except the trial court's Finding No. 25 in part. AR 1030. ZDI contends approval of cash cards in the tribal lottery system is relevant.

Over ten years ago, the Washington State Gambling Commission ("the Commission") approved pull-tab dispensing equipment that looks like a slot machine. AR 701. The outward appearance of the equipment was considered an acceptable entertainment feature that did not alter the player's opportunity to win a prize. AR 128, 715. Later in 2002, Director Day approved similar pull tab equipment known as the ZDI VIP. AR 295, 274. Presently, there are 135 ZDI VIPs. Declaration of Jay Gerow dated Oct. 7, 2007 ("Gerow Dec."). ZDI is the exclusive manufacturer of the VIP. The ZDI VIP is depicted at CP 626-658 and AR 108-116.

This case concerns an upgrade to the ZDI VIP. AR 121, 155-156. The upgrade allows the player to use a cash card. AR 113-116, 155-156. Cash cards are commonly referred to as a gift card. AR 63. A cash card is not a credit card. AR 275. The cash card is the only change to the approved equipment. AR 439.

ZDI's VIP does not compete with the electronic scratch ticket terminals operated at tribal venues. AR 410, 726. Equipment sold to tribes rapidly display electronic scratch tickets. Despite the faster play, the Commission authorizes players to use cash cards. AR 864, 583, 220, 224.

In June of 1998, the Commission approved 18,000 tribal lottery system terminals that rely upon cash card technology. AR 878, 536 and Appendix 1. By March 30, 2007, after denying use of cash card technology to ZDI, the Commission increased the number of terminals available to nearly 30,000. CP 583-609. Thousands of Class II bingo equipment also use cash cards. AR 379-381. The State makes no objection to these machines. While machine gaming at tribal venues generates billions, pull-tab gaming revenues are spiraling downward from a market high in 2001. CP 624; AR 623.

Pull-tab licensees like to use cash cards. AR 739-743. Cash cards are popular and provide regulatory controls unavailable with paper gift certificates. AR 880. Cash cards operate off a computer system that create an accessible audit trail unavailable with paper gift certificates. AR 705-706, 740. In 2004, a pull tab licensee confirmed in writing that he could use a cash card for pull tab gaming in his restaurant. AR 741, 283, 285. Also in 2004, the Commission approved Donovan, a prepaid debit card company, to use debit cards in casinos. AR 293, 215.

Cash cards are not the only approved cash substitute for pull tab prizes. Staff approves the use of gambling chips as a prize for pull-tabs. AR 204, 469-471. Vouchers are acceptable. WAC 230-40-130. Customers routinely play back their winning pull tabs to receive more pull tabs. AR 706. Merchandise prizes have always been acceptable. WAC 230-30-070. On July 22, 2005, the Commission issued a Field Operations Rule Interpretation specifically approving the use of gift certificates to redeem the winning value of a pull-tab. AR 572.

In March of 2005, ZDI asked the Commission to approve its equipment upgrade. AR 11-15. The upgrade was cash card technology, like that presently used at the counter, attached to the paper pull-tab dispenser. Both the pull tab equipment and cash card technology are permitted when operated independently. AR 741. ZDI just put them together. AR 775. The cash card acceptor allows the operator to buy a paper pull-tab from the equipment with the card, rather than cash. AR 773. When the player is finished, if the player elects to put the winning pull tab back into the terminal, the value of any winning paper pull-tab under \$20.00 is recorded on the cash card. AR 774. Instead of repeatedly adding in unlimited amount of money, the player may limit spending to what is recorded on the card. The Commission admits the regulatory benefits. AR 880.

The Gambling Equipment Team (GET) representative, who received the submittal in March 2005, told ZDI the upgrade should be approved. AR 857. In July, the GET team coordinator recommended approval of the equipment (AR 468); however an official approval letter was never sent. Instead, on August 15, 2005, the Assistant Director of Licensing Operations rejected the upgrade. AR 69-70. ZDI petitioned the Commission for Declaratory Relief. AR 1-5.

The Commission refused to rule on the declaratory judgment and instead referred the matter to an Administrative Law Judge (ALJ) for fact finding and conclusions of law. AR 779-91. The matter was heard before an ALJ who previously worked for the Commission as an Assistant Attorney General. AR 88.

The Commission's position was presented by its speaking agent, Dallas Burnett. AR 93. He testified that the upgrade would not be an expansion of gambling (AR 829) and that the upgrade would improve regulatory controls. AR 880, 884; *See also* AR 267. He testified that gift certificates are permitted as prizes for pull-tabs and that if a cash card was a gift certificate then a cash card is an acceptable prize. AR 891, 893, 183. He also testified that human contact with a cashier to award the prize was not a basis to reject the upgrade. AR 857-858.

ZDI offered the testimony of former Commission Director Frank Miller. AR 698-734. Mr. Miller was the Director in 1997 when the equipment was initially approved. AR 699. Mr. Miller testified that he would approve the upgrade because of the enhanced regulatory controls. AR 705, 725. He testified the upgrade would not make the equipment a “gambling device” and testified that the Commission has a duty to protect, rather than promote, the industry through regulation and control. AR 706, 714-716. Human interaction was not a criteria to reject the automated limited cashier function. AR 724-725, 705. The Commission could not “expand gambling” and any increase in play of the equipment would not be a regulatory concern because pull-tabs are legal. AR 722-723. It would however, be a benefit to an industry that has been suffering significantly since the approval of the tribal lottery system. AR 705.

The Administrative Law Judge issued a lengthy opinion explaining that the crediting of the winning pull-tab value to the cash card did not make the equipment a gambling device because the paper pull-tab controlled the gambling activity. AR 408-424. He also deferred to the Commission to consider a rule change to add the term “cash card” to its rules to conform the rules to modern technology. AR 423-424.

ZDI asked the Commission to agree to a rule change to add the term “cash card” to its rules. CP 770. The Commission refused. CP 295-

300. ZDI petitioned the Commission to review the ALJ's ruling on the term "cash card." AR 428. Staff appealed the portion of the ALJ's decision that the upgrade was not a "gambling device." AR 573.

In July, 2006, the Commission changed its rules to allow the use of a cash card to purchase pull-tabs. CP 658, Appendix 2.

On August 10, 2006, the Commission issued its final Order on the Petition for Review. AR 961-965. The Commission affirmed the ALJ's order on cash cards and without any rationale "vacated and specifically disavowed" the ALJ's determination that the upgrade was not a gambling device.

On September 11, 2006, ZDI petitioned for judicial review of the Commission's Final Order. CP 351-370. The State moved to dismiss. CP 330-339. The matter was transferred to Thurston County. CP 7-8. The State filed a second motion to dismiss, but did not assert any challenge to the transfer of venue or to its present argument that the superior court lacked jurisdiction due to ZDI failing to file within thirty days in Thurston County. CP 379-386. The trial court granted the State's motion in part, limiting review to RCW 34.05.570(3). CP 667-668.

On May 1, 2007, the petition for judicial review was heard in Thurston County Superior Court. The Court issued a written opinion letter (CP 1063-1065) and later in August entered findings of fact and

conclusions of law in favor of ZDI. CP 1067-1068, 1052-1062. The Court specifically found the Commission acted arbitrarily and capriciously and outside of its statutory authority. The Court ruled the upgrade complied with the law and that it was not an “expansion of gambling.” The Court awarded ZDI some of its attorney’s fees and costs. CP 1075-1076. The State appealed the Superior Court ruling on September 15, 2007, and ZDI cross-appealed on September 17, 2007.

In January 2008, the Commission passed a new rule that it adopted in retaliation for ZDI’s challenge of its authority. State’s Brief, Appendix C. The new rule purports to prohibit ZDI’s upgrade with regard to the redemption of prizes. An action is currently pending in Thurston County to invalidate the new rule on several grounds. State’s Brief, Appendix C.

IV. STANDARDS OF REVIEW

Review of this action is governed by the APA provision on judicial review of “agency orders in adjudicative proceedings.” RCW 34.05.570 (3). Nine grounds provide authority to reverse agency action. The trial court applied four of the nine grounds to reverse the Commission:

- The order is outside the statutory authority or jurisdiction of the agency;
- The agency erroneously interpreted and applied the law;
- The order is not supported by the evidence;
- The order is arbitrary and capricious.

RCW 34.05.570 (3) (b), (d), (e), and (i).

ZDI contends two additional grounds support the trial court's reversal:

The order violates ZDI's constitutional rights; and
The order is inconsistent and the Commission fails to provide any rational basis for the inconsistency with its own rules.
RCW 34.05.570 (3) (a) and (h).

At the trial court level, the State moved for reconsideration of the trial court's decision. CP 1013 – 1020. The State did not appeal the trial court's order denying reconsideration. CP 1035-1037, *State's Notice of Appeal*. Thus, the trial court's order on reconsideration is a valid order in favor of ZDI. RAP 5.2, RAP 18.9(b).

This Court should affirm the trial court's decision because the trial court did not err in finding against the Commission. The Commission permits the use of a cash card to purchase pull-tabs from the ZDI VIP and the Commission permits use of a cash card to redeem prizes at the counter and with equipment sold by vendors to tribes. It has no authority to prohibit it automatically on ZDI's equipment.

V. ARGUMENT

A. The Commission Acted Outside Its Statutory Authority

1. The Commission's Role is to Regulate Legislatively Authorized Gaming Activities, Not to Suppress Gaming Activities the Legislature has Authorized

WASHINGTON CONSTITUTION ART. II, § 24 prohibits all lotteries except as authorized upon the affirmative vote of sixty percent of the

members of each house of the legislature. The State contends the Commission has “plenary” powers over gambling. However, under ART. II § 24, all gambling is prohibited unless the Legislature approves of the activity by a supermajority. Thus, the Legislature is without authority to delegate to an agency the ability to prohibit gambling activities. *Sackett v. Santilli*, 146 Wn.2d 498, 504-505, 47 P.3d 948 (2002), *quoting Diversified Inv. P’ship v. Dep’t of Soc. And Health Servs.*, 113 Wn.2d 19, 24, 775 P.2d 947 (1989). Delegation of its Legislative function would violate separation of powers. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 234, 11 P.3d 762 (2000).

The trial court’s decision is consistent with the constitutional limitations:

“The function of the Gambling Commission is regulatory. The Gambling Commission itself does not have the power to expand the practice of gambling or the authority to prohibit gambling. This power was not delegated by the legislature to the commission. Since there is no statutory support for prohibiting cash card acceptors in pull tab vendors the Gambling Commission exceeded its authority by denying ZDI’s petition.” CP 1064-1065.

2. There is No Basis in Law or Fact to Withhold Approval of Cash Card Technology, which Enhances Regulatory Control

Cash card technology is not mentioned in the Gambling Act. RCW 9.46. Cash card technology is not “gambling.” RCW 9.46.0237. Cash cards are treated as a gift certificate in statute. RCW 19.240.010(5).

The State's reference to RCW 9.46.070 (11) is misguided. First the statute was never a contention at the trial level. AR 673-918. The statute was never mentioned in the Commission's objections or final order. AR 21, 23, 961-962. There are no findings concluding a cash card is a prohibited prize or that the cash card is the prize on ZDI's VIP. CP 1052-1053. ZDI contends the pull tab prize is either cash or merchandise, whichever the pull tab game in play designates on the flare. The cash card used as a limited cashier function at the VIP does not alter the pull tab prize.

Cash cards have never been a prohibited prize. In fact, cash cards are prizes for pull tabs just like gift certificates are prizes for pull tabs. A cash card prize may be attached to the flare and removed when the winning ticket is played. When the cash card is the prize it is the same as merchandise. The card has market value. Cash cards are traded over the internet and sold in grocery stores. AR 794; CP 183. The Commission has never objected to the flare because the VIP upgrade does not affect marking the flare. AR 729-730 AR 673-918. Low tier winning tickets are not marked off the flare whether purchased at the VIP or the counter. WAC 230-14-100.

What the Commission is attempting to prohibit is ZDI's use of the cash card to store a cash prize, the limited cashier function. When the

cash card is used as a storage receptacle for a cash prize, rather than as the prize itself, then the cash card does not implicate the Commission's powers under the statute. A cash card does not change the wager or the prize. The wager is still a dollar. The prize is still the monetary value designated by the pull tab.

RCW 9.46.070 (11) does not give the Commission authority to prohibit cashier functions. In fact, the Commission does not even regulate cashier functions. Human cashiers are not even licensed.

Unlicensed unregulated human cashiers use cash cards to record a cash prize at the counter. CP 1057; AR 740-742. There is no regulatory authority to prohibit automation of that function, particularly given the regulatory advantages and benefits to smaller businesses. AR 724-725. The State's argument that it has "plenary" power to prohibit an automated limited cashier function evidences its abuse of discretion and arbitrary exercise of power. It has no authority to prohibit automation that enhances regulatory control.

An enabling act such as the Gambling Act is not sufficient to establish delegation of rulemaking authority to an agency. RCW 34.05.322. "Since administrative agencies are purely creatures of legislation without inherent or common-law powers, the general rule applied to statutes granting powers to them is that only those powers are

granted which are conferred either expressly or by necessary implication.” *Brown v. MacPherson’s, Inc.*, 86 Wn.2d 293, 304, 545 P.2d 13, 20 (1975). “The court cannot read into a statute anything which it may conceive that the legislature has unintentionally left out.” *Brown* at 305.

The Legislature never authorized the Commission to prohibit regulatory enhancements. Regulatory enhancements in cashier functions benefit the regulatory purpose of the Commission, without alteration to the element of chance inherent in the approved pull tab, which is the gambling activity.

The Gambling Act was designed to prevent corruption through regulation. The Commission’s powers are regulatory, not prohibitory. RCW 9.46.010. The Act represents a shift in public policy away from the previous prohibition system where unregulated gambling was prolific and corrupt. AR 700. RCW 9.46.070, the statute delegating limited power to the Commission, does not use the term “prohibit.” Instead, the authority is specific to gaming activities, not cashier functions, and authorizes the Commission to “regulate and establish.” AR 722.

The Legislature authorized liberal construction of Commission powers to closely control the gambling activities authorized by the Legislature. *Id.* Historically the Commission followed the adage that any innovation that improves regulatory control is permitted. AR 728; CP

157-158. Any innovation that interferes with regulatory control is not. The vision of the agency has always been to “Anticipate, Innovate, and Excel.” www.wsgc.wa.gov. Computerized innovation such as the limited cashier function available using cash card technology meets the regulatory and policy objectives of the agency. CP 158-159; AR 728.

Without the limited cashier function of the cash card, pull tabs prizes are awarded in cash or more pull tabs by a cashier who is not subject to Commission scrutiny. Cashier cash transactions cannot be remotely or randomly audited unannounced.

Pull tabs are not a considered a “vice” as argued by the State, instead the Legislature characterizes pull tabs as a social pastime. RCW 9.46.010. Social pastimes are to be protected from Commission restrictions that limit participation in the activity. RCW 9.46.010. The Legislature has specifically declared that participation in social pastimes is in the “public interest.” RCW 9.46.010.

Pull tabs serve two primary public policy objectives. Restaurants and other small businesses rely upon pull tabs as a “commercial stimulant.” RCW 9.46.0325. Non-profit and charitable organizations depend on the revenue to support needed social services. RCW 9.46.0209. Licensees want cash card technology to protect their pull tab business and to reduce overhead. AR 740-743.

If the Commission is allowed to prohibit technology that improves regulatory control, then the Commission ceases to function as a regulatory body. Instead the State reverts to a prohibition system, which was specifically rejected by the Legislature because it promotes corruption.

B. The Trial Court Correctly Determined Cash Card Technology is Permitted by Statute and Rule

When the ZDI upgrade was rejected, staff attempted to support its position on four grounds. AR 21-23.

First, staff claimed a limited cashier function would make the equipment a gambling device under RCW 9.46.0241(1). The ALJ rejected staff's position explaining that the limited cashier function of the cash card does not alter the player's opportunity for chance. AR 416-419. The player gets nothing more or less than a paper pull tab and the preprogrammed win recorded on the paper pull tab. The cash card does not affect the winning outcome. AR 722. The gambling device issue is further addressed in subsection (c)(1) of this brief. Use of a cash card does not make the equipment a "gambling device."

Staff's second objection was the rules governing the purchase of pull tabs did not affirmatively state a pull tab can be purchased with a cash card. AR 854. This left staff vulnerable under WAC 230-12-050(2), a rule regarding the purchase of pull tabs. AR 882. Under current

conservative leadership, staff expressed concern in permitting any activity not specifically authorized in rule. AR 184.

After the fact finding hearing and prior to its ruling on the petitions for review, the Commission changed WAC 230-12-050(2) to specifically authorize the purchase of a pull tab with a cash card. CP 318. After the rule change was adopted, the Director approved the ZDI upgrade in part. AR 880-881; Gerow Dec., Ex. B. ZDI is authorized to add the cash card acceptor to its pull tab equipment so long as the pull tab prize is not added on to the card at the equipment. Without question, staff's second objection was eliminated by the Commission's rule change. The ZDI upgrade complies with the amended WAC 230-12-050(2).

Staff's third objection was that the rules governing the redemption of pull tab prizes do not affirmatively state a pull tab prize can be a cash card. Again staff felt the absence of an affirmative statement left them vulnerable under WAC 230-30-070(1), the rule on pull tab prizes. The Commission has not amended this rule.

This rule allows an award of pull tab prizes in either "cash" or "merchandise." The trial court analyzed this rule under basic principles of statutory construction and held cash card technology meets the requirements of the rule. CP 1060-61, AR 1063-64.

The State objects to the trial court's ruling, arguing the trial court has prevented it from defining its own rules. State's Brief at P. 25. Apparently, the Commission thinks it has "plenary" power to interpret undefined words at its discretion. Fortunately, the Commission's powers are not that dictatorial. Where there is no ambiguity in the rule, the agency's interpretation of the law is not given any deference. *ARCO v. WA Utilities and Transp. Com'n*, 125 Wn.2d 805, 888 P2d 728 (1995). The Commission's powers are constrained by the rules of statutory construction. Absent a definition, terms are given their plain and ordinary meaning. *State v. Sullivan*, 143 Wn.2d 162, 19 P.3d 1012 (2001). If an undefined statutory term is not technical, a dictionary definition may be used to establish the meaning of the word. *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005).

With regard to the question of whether a cash card fits within the definition of "cash," cash is not limited to currency. The term "cash" includes cash equivalents. The definitions relied upon by the trial court include Black's Law Dictionary: "cash. Money or its equivalent; usually ready money."; and Merriam Webster's Dictionary (1998): "cash 1: ready money, 2: money or its equivalent paid at the time of purchase or delivery."

The ALJ introduced a notion that cash has “universal acceptance.” While a cash card is issued by a particular vendor for use at that location, if a patron requests the currency, the vendor exchanges the card for currency. RCW 19.240.020. *See also* State’s Brief, Appendix C and WAC 230-14-047(e)(b). As a practical matter, a cash card merely stores the currency at the customer’s discretion.

Cash equivalents are not “universal” in application. A check or money order is not universally accepted at other locations. Once endorsed, only one location may accept it. Cash cards are the same, once the commitment of money has been made to a particular vendor, the card is used for the vendor’s services only.

Other cash equivalents accepted by the Commission such as vouchers, chips, or pull tabs are not universally accepted. “Universal application” is not a distinguishing characteristic of a cash card from a cash equivalent. Thus, a cash card meets the plain and ordinary definition of cash because it is a cash equivalent.

With regard to the question of whether a cash card is “merchandise,” cash cards fit the statutory definition. RCW 19.178.010(3) defines merchandise as “goods, wares, or other property or services capable of being the object of a sale regulated under this chapter.” The trial court also referenced Black’s Law Dictionary definition: “all

goods which merchants usually buy and sell, whether at wholesale or retail; wares and commodities such as are ordinarily the objects of trade and commerce.”

The state attempts to confuse the court by arguing the ZDI VIP awards electronic credits as the prize, which cannot be packaged or sold like merchandise. The ZDI VIP does not generate credits or anything of value. AR 720, 704. The ZDI VIP does not award any prize. The prize is determined by the pull tab. The customer decides if they want their cash prize on a cash card. Even if the customer buys the pull tab with a cash card at the VIP, the customer can elect to take the pull tab to the cashier for money, rather than putting the pull tab back into the VIP to automatically transfer the money prize to the cash card. The transfer of the cash prize to the cash card is an election by the player to convert the paper pull tab prize into a cash card, rather than money. At that point, the plastic magnetic strip card is a commodity that can be counted, packaged, wrapped, sold in grocery stores and traded over the internet.

The important characteristic of a cash card is that a cash card is not a credit card. AR 706. Cash cards used by ZDI are not linked to any bank account or other credit lending organization. AR 722; AR 794. Thus, there is no risk of harm from accumulation of debt.

The Legislature provides another legal ground to equate a cash card with “merchandise”. Under RCW 19.240.010 (5) a gift certificate is a gift card. A gift card is a cash card. RCW 19.240.010(4). The Commission considers gift certificates merchandise and equates gift certificates with cash cards for purposes of purchasing pull tabs. CP 299. AR 890-891, 893. The Commission has officially approved the use of gift certificates as merchandise prizes for pull tabs by field operation memo. AR 572. The Commission reaffirmed its position that gift certificates are merchandise prizes for pull tabs after ruling on the ZDI matter and set forth its position in writing. CP 658. The Commission has recently proposed a rule consistent with its Field Operations Memo affirming the use of gift certificates as pull tab prizes. Appendix 2. There is no discernable difference between a gift certificate and a cash card. Thus the trial court correctly concluded gift cards were within the plain meaning of the term merchandise. ZDI’s use of cash cards complies with the rules.

Staff makes an erroneous claim that the “merchandise” issue was never before the Commission for consideration. Staff’s claim is factually incorrect. The “merchandise” issue was before the ALJ, the Commission, and the trial court. AR 890, 891, 893, 9905; CP 238, 472-474. ZDI has never waived its position that a cash card is merchandise.

Staff's fourth and final objection regarding human contact with the cashier under WAC 230-30-050 was never supported by the evidence. Staff testified it was a non-issue. AR 423. The Administrative Law Judge considered staff's fourth objection unwarranted. AR 423. The Trial Court affirmed. CP 1060.

Under current requirements, a customer may occupy the pull tab equipment all day without taking winning pull tabs to the counter. There is no limit to the number of pull tabs a customer may purchase from the machine. The cash card does not change that characteristic. Further, the Commission amended its rules to permit the purchase of pull tabs with a cash card. It could not think contact with the cashier was important. The Commission did not limit the amount of money a customer could put on a card that the customer could use to purchase pull tabs. At present, ZDI customers can spend hundreds of dollars buying pull tabs from its equipment without ever cashing in a winning pull tab. Staff's objection regarding contact with the cashier is not well founded.

ZDI's upgrade should have been approved because it complies with the Commission's rule on pull tab dispensers. Pull tab dispensers that meet the standards of WAC 230-30-097 comply with the law. The rule does not prohibit cash cards. In fact, the rule suggests cash cards are permissible if notice requirements are met: "Devices utilizing bill

acceptors or **similar devices** that do not return change shall clearly disclose that fact to the consumer.” WAC 230-30-097 (6) (Emphasis added).

The Commission’s New Rule Targeting Use of Cash Cards As Prizes on ZDI’s VIP is Under Judicial Review, and In Any Event Would Not Moot This Appeal.

In January 2008 after ZDI prevailed, the Commission adopted a new rule for electronic pull tab equipment. State’s Brief, Appendix D. The new rule targets the ZDI VIP upgrade by authorizing the purchase of pull tabs with a cash card and not affirmatively authorizing the use of cash cards for prizes. The rule prohibits any activity not specifically authorized by the rule. ZDI has asked Thurston County Superior Court to void the new rule on several grounds. Appendix 3 The rule was adopted without consideration of the impact on small businesses in violation of the APA. RCW 34.05.310(2); RCW 19.85.040. The rule was adopted by two votes, rather than the statutorily required three votes. RCW 9.46.050(2). And finally, the rule violates the rights of ZDI and is without statutory authority. ZDI expects the rule will be deemed void.

The new rule does not moot the appeal even if the new rule is ultimately validated. ZDI should have been operating its equipment since March of 2005. In this action, ZDI requests fees and costs for asserting its rights through the trial court level and on appeal. ZDI’s claim includes

reimbursement under the Equal Access to Justice Act, which ZDI has yet to recover from the State. The State requested a stay, which was granted.

ZDI should have been paid the costs and fees awarded to date under the Equal Access to Justice Act. The Act does not ameliorate the state's obligation to pay an award on appeal when the trial court rules in a party's favor. The mere fact that a party achieves success at the trial level entitles the party to the award. RCW 4.84.350. If the State can stay payment by appeal, the small business litigant suffers. The inequities in power that the Equal Access to Justice Act was intended to rectify disappear.

C. The Commission's Prohibition on the Use of Cash Card Technology is Not Supported by the Evidence.

1. The ZDI upgrade is not a "gambling device."

ZDI's upgrade is not a "gambling device", but even if it was, the upgrade would not necessarily be illegal. The mere fact that gambling equipment meets the definition of "gambling device" does not mean the equipment is illegal. The Gambling Act defines "gambling device", and imposes penalties against individuals who do not have authority for the device. RCW 9.46.215. The Legislature clearly recognized that gambling devices were legal for pull tabs, and specifically authorized fees from the sale of pull tabs from devices. RCW 9.46.116.

The distinguishing characteristic between equipment and a gambling device is the capacity of the equipment to generate the opportunity to win a prize. AR 418. In any gambling device, the device itself generates the element of chance. RCW 9.46.0241(1). Gambling devices include a random number generator or other technology that creates value. AR 719-720.

The ALJ in this matter provided a lengthy analysis describing why the upgrade to the ZDI VIP with the cash card acceptor did not make the approved equipment a “gambling device.” AR 418-419. The paper pull tab is not altered by the equipment. *Id.* The element of chance remains preprogrammed in the paper pull tab. *Id.*

The Commission has never articulated any basis for disagreeing with ZDI and the ALJ. In fact, the Commission cannot conclude the ZDI VIP upgrade is a gambling device without reversing approval of existing technology. AR 704.

If the upgrade is a gambling device that the Commission chooses to prohibit, then the equipment operating since 1997 would violate the law as would the thousands and thousands of Class II and Class III machines operating throughout the State.

At the Federal level, under the Johnson Act, the distinguishing characteristics of the ZDI VIP and the upgrade described by the ALJ are

recognized. AR 476-494. The federal government articulates the distinction as the difference between an electronic facsimile of a gambling activity and a technological aid to assist in the play of the gambling activity. 25 U.S.C. § 2703(7); 25 C.F.R. § 502.7(a). Electronic facsimiles are prohibited. Technological aids are permitted.

The definition of “gambling device” follows this logic. Electronic pull tabs are specifically characterized as gambling devices. An attorney general opinion describes the essential characteristic of pull tabs in this state is the paper itself. AR 135-142.

The ZDI VIP upgrade does not violate the paper pull tab requirement. A player may merely purchase a paper pull tab every time. The cash card does not award more pull tabs or gambling opportunities. Instead the equipment is entertainment that has little to do with the gambling activity. A player can buy more chances and play the chances much faster by purchasing the whole game set of paper pull tabs at the counter and opening the pull tabs in rapid succession. The State has never rebutted this fact. The VIP equipment actually slows the gambling activity by forcing the player to purchase one ticket at a time. The player may elect to return the ticket to the machine to watch the spinning wheels and listen to the audio sounds before collecting the prize recorded on the paper ticket.

After losing the gambling device argument before the ALJ, staff cross appealed the order and interjected a new argument that the ZDI VIP upgrade was a gambling device as defined under subsection (2) of the definition. However, staff's argument contradicted its trial testimony. AR 179. The Commission reversed the ALJ's decision, but made no findings of its own and never adopted staff's later argument. AR 962.

None of the other remaining provisions of the definition of gambling device apply because pull tab gambling is not "professional gambling." RCW 9.46.0269. Pull tab gaming is an authorized social pastime. RCW 9.46.010 & .0273. As a matter of public policy it is the Commission's job to protect, not promote, but to protect the activity to achieve success for the benefit of non-profits and charities, and as a commercial stimulant. RCW 9.46.0325; RCW 9.46.0311.

The State mentions in a footnote that neither party petitioned for review of the gambling device issue. The State is incorrect. ZDI appealed the Commission's order in its entirety. CP 1001-1005. The trial court took up the state's argument on reconsideration and ruled that the Commission's decision to "vacate and specifically disavow" the ALJ's ruling that the upgrade was not a gambling device meant the Commission disposed of the issue entirely. It became a non-issue. 8/17/07 VRP at 25. ZDI has no objection to a ruling that the gambling device issue may not be

a basis to deny the technology; however, if the State intends to revisit the issue after this appeal, the State should be barred under principles of res judicata or collateral estoppel. The ALJ decided the matter and there is no basis to consider the upgrade a gambling device. ZDI is entitled to finality in these matters and should be permitted operate its upgrade immediately.

2. Use of a cash card does not expand gambling.

The State has repeated the phrase “expansion of gambling” throughout these proceedings as if there is some legal prohibition against the “expansion of gambling.” No such legal prohibition exists. There is no statute, no case law, and no constitutional provision prohibiting an “expansion of gambling.” Instead the phrase is a shorthand for a parliamentary discussion in the legislature when gambling bills reach floor action. CP 660-662. Legislators have used the term to inquire whether a measure violates the art. II, § 24 provision of the constitution that requires supermajority vote of the legislature to authorize any lotteries. *Id.* The parliamentary rulings have been justified through consideration of whether the measure authorizes gambling not previously approved – hence the inquiry “Is it an expansion of gambling.” The parliamentary rulings are not particularly dispositive, but rather political in nature. *Id.*

The “expansion of gambling” theory has no application to this matter. The Legislature has already approved pull tabs and pull tab devices. RCW 9.46.010; RCW 9.46.116.

Staff testified the ZDI VIP would not “expand gambling.” AR 879. Former Commission Director Miller testified the ZDI VIP would not “expand gambling.” AR 722-723.

There is absolutely zero evidence in the record that pull tab sales would increase. Certainly ZDI hope sales would increase, but increased sales has never equated to an “expansion of gambling.” AR 706. Pull tab sales are supposed to be profitable to serve their statutory purpose. *Id.*

There is absolutely zero evidence in the record that more machines than currently exist would operate in this state. Gerow Dec. at ¶ 7.

Defendant State interjects fear and tainted terminology such as “vice” for affect. The suggestion is that the State will be overrun with machine gaming if ZDI is permitted to use cash card technology. The State’s position is pure nonsense.

D. The Commission’s Actions Are Arbitrary and Capricious.

The Commission never articulated any reason why a cash card is permitted to purchase a pull tab, but not to award a prize. CP 299-300. There is no rationale for such a distinction. *Id.* In fact, prohibiting the

back end prize while permitting the front end purchase ameliorates the regulatory value of the cash card.

Strict regulation and control is the direction given to the Commission, yet the Commission has made a decision that contravenes the Legislative directive. There is absolutely no contest over the improved regulatory benefits of cash card technology.

Cash exchanges are eliminated. Automated audit reports can be generated quickly and remotely. Overhead is reduced because fewer cashiers are required, and the cashier dependence upon a trusted and competent cashier is eliminated. Checks and balances are inherent to the activity that does not exist without the controls.

The State's efforts to provide justification after the fact on appeal violate the restrictions of the APA, which prevent a party from making novel arguments on appeal. RCW 34.05.534.

Neither argument from the State's appellate brief were grounds relied upon by the Commission to deny use of a cash card for prizes.

1. The entertainment function of the ZDI VIP slows the game of pull-tabs.

In its brief, the State now contends that cash card technology speeds up the rate of play and that is why the Commission was justified in denying the technology. *Appellate Brief at 1*. The Commission's order

has absolutely zero findings of fact to support the State's argument. AR 961-963. Neither does the ALJ opinion. AR 436-442. The trial court also commented "there is no support for the position that the use of cash cards expands gambling in any way." CP 1065. Speed of play is a new argument for the State that bears absolutely no relationship to the record below. There is no reference to speed of play in the letter from staff denying approval of cash cards. AR 21-22. There is no testimony from any expert opining that the speed of play would increase. In fact, former Director Miller contrasted the slow speed of the ZDI VIP against the "fast, fast, fast" speed of a traditional slot. AR 715-716.

In reality, the ZDI VIP does not speed up the play of pull tabs, the pull tab plays at exactly the same rate. With a cash card, the player can purchase only one ticket at a time. The same number that can be purchased with cash. If the pull tab is a winner and the value of the win is recorded on the cash card, the player is not awarded more pull tabs. Instead, for the exact same consideration of a dollar, the player can purchase one more pull tab.

The equipment actually slows down the quantity of pull tabs consumed by the player at any given time. A player can open more pull tabs without putting the paper ticket back in the equipment. The equipment is entertainment that actually slows the gambling activity. The

customer occupies his or her time watching the spinning reels, rather than opening multiple tickets. Use of a cash card does not change that fact. The cash card technology itself provides accountability to the player that the player spending undocumented amounts of cash does not have. The player currently is able to put unlimited amounts of cash into the machine. With a cash card, the technology accounts for every dollar spent. AR 643-646. The card allows the customer to limit their activity to the monetary value of the card. With cash, the customer can empty his or her pockets and have no record of his or her investment.

The State's other angle to its argument regarding "speed of play" is that customers will buy more pull-tabs. Again this argument is a new one made after the Commission entered its order. The issue is not present in the State's brief before the Commission. AR 329-334. The issue is not present in the State's brief in Closing Argument before the Commission. AR 372-375. The issue is not present in the State's cross Appeal and Reply to Petition for Review. AR 573-580. The issue is not present in the State's closing argument before the ALJ. AR 909-914. The issue is not mentioned in the ALJ's order. AR 961-963. The issue was not mentioned by the Commission when it first rejected the technology. AR 151-152. The issue was not the opinion of the staff or any expert at trial. AR 836-894.

Staff's speaking agent testified that there was no consideration of cash technology improving sales of pull tabs:

Q: The GET team didn't really get into a discussion about the value of pull tab gaming and innovation in that arena as it pertains to the RCW that approves it as a commercial stimulant, did it?

A: No. No, we didn't even look at the RCW. Staff clearly supported use of a cash card if the rule mentioned the word cash card. AR 854.

Increased play of pull tabs is not an objection that the Legislature authorized the Commission to prohibit. Instead, the Legislature directed the Commission to protect the play of pull tabs so as to preserve the value of the activity for non profits, charities, and as a commercial stimulant. RCW 9.46.010. So, if the cash card does increase sales of pull tabs then such success is a good result consistent with the policy objectives of the Legislature.

Pull tab gaming revenues are not limited. Historically there was a requirement that pull tab revenue not exceed revenues generated by meals and drinks. RCW 9.46.0217. To be a commercial stimulant the pull tab sales had to be "incidental." However, the Legislature repealed that policy in 1994. CP 717. For more than ten years there has been no limit on pull

tab revenues either as a commercial stimulant or for non profits and charities.

The Commission's rules do not cap revenues. In fact, the Commission's fee schedule contemplates annual pull tab revenues of over eight million dollars. WAC 230-04-203, AR 510. The Commission categorizes charitable and non profit organizations in "regulatory groups" based upon gross gambling receipts at levels that exceed five million dollars. WAC 230-12-076. None of the pull tab licenses are generating five million dollars of revenue in pull tab gambling. CP 487.

Social pastimes have always been profitable, and far more profitable than they are right now. AR 410. There is no evidence in the record to support the claim that the cash card will reverse the downward trend of pull tab sales. However, if it does, that would be a benefit to everyone and would support the reasons why pull tabs are legal.

2. Cash card technology requires human interaction.

The State's argument on appeal that cash card technology eliminates human interaction contradicts the Commission's own testimony and the findings of the Administrative Law Judge. AR 450. The Commission's order makes no findings on this point. AR 961-962. There is absolutely zero factual evidence in the record to support the State's position.

Human interaction cannot provide the criteria to deny use of cash card technology to ZDI because human interaction is not eliminated. If the cash card is the prize, the customer must interact with staff to load monetary value on the card, to purchase food and drink from the value of the card, and to exchange the card for currency. If the Commission wanted to require human interaction in the play of pull tabs, then the Commission would not have amended its rules to allow the customer to buy pull tabs from the equipment with a cash card of unlimited value. If you can buy a pull tab without human interaction, then awarding the prize makes no discernable difference. There are no rules that require human interaction. The player can stay at the VIP or any other mechanical pull tab dispenser all day right now without ever appearing before the cashier to redeem the prize. Awarding the prize on a cash card does not alter that fact.

A player currently is not required to redeem the prize at any given time. A player may purchase the entire game set without ever redeeming the prize. There is no evidence in the record to support the states argument. No one has testified that use of a cash card will change the number of times a player will interact with the cashier. In fact, the player may buy more food and drinks if the player has recorded value on his or her cash card and need not spend more money than has accumulated on

the card. Players purchase food and beverages from staff on the floor, not just at the counter.

The State's contention on human interaction is a meaningless argument without justification. Many of the businesses and entities dependent upon pull tab revenues benefit when the player can account for winnings on a cash card, without exchanging cash with the cashier. Regulatory rules require consideration of the impact on small businesses. The Commission failed to consider the impact on small businesses in prohibiting a limited cashier function. Businesses value cash cards because of the accounting controls. AR 742. Smaller businesses reap the benefits of pull tabs without suffering increased overhead demands from staff required to redeem low tier winners who may make mistakes. A cashier is still required for prizes that exceed twenty dollars. If the cash card does eliminate the overhead and losses associated with a cashier exchange, then the regulatory benefits of the card have improved regulation and control of gambling, meeting the legislative intent of eliminating and or reducing corruption.

E. The Commission's Prohibition To ZDI is Inconsistent With Its Own Rules and the Commission Has No Rational Basis For the Inconsistency.

The Commission's prohibition of cash card technology for ZDI is inconsistent with Commission approval of cash card technology in tribal

compacts and its acquiescence of Class II Bingo machines using cash cards. Even though the regulations are managed in rule for non tribal entities and by compact for tribal entities, the Commission's powers are the same. The Commission does not have the power to negotiate exclusive gaming rights for the tribes or to grant special privileges to vendors selling to tribal entities.

Nothing in the law authorizes a tribal entity to use technology unavailable to any other entity. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1258 (9th Cir. 1994), *cert. denied by Sycuan Band of Mission Indians v. Wilson*, 521 U.S. 1118, 117 S. Ct. 2508, 138 L. Ed. 2d 1012 (1997). In fact, under federal law, a state may only negotiate regulatory controls in a compact for gaming activities that are permitted in this state. Congress determined that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701[5]. The key phrase from the Indian Gaming Regulatory Act (IGRA) is that a state "permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710[b][1][A]; [d][1][B].

IGRA does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming. Instead, the statute says only that, if a state allows a gaming activity ‘for any purpose by any person, organization, or entity,’ then it also must allow Indian tribes to engage in that same activity. 25 U.S.C. § 2710(d)(1)(B). In other words, a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.

As a matter of law, the technology must be permitted for ZDI or the technology could not be authorized in the tribal compacts.

F. The Commission Has Violated ZDI’s Constitutional Rights to Substantive Due Process.

Both the Washington and United States Constitutions provide that no person shall be deprived of “life, liberty, or property without due process of law.” U.S. CONST. AMEND. XIV, § 1; WASH. CONST. ART. I, § 3. “Due process centrally concerns the fundamental fairness of governmental activity.” *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 312, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992). *See also Standlee v. Smith*, 83 Wn.2d 405, 411, 518 P.2d 721 (1974) (“The court emphasized that fundamental fairness was the touchstone of due process.”); *State v. Johnson*, 9 Wn. App. 766, 771, 514 P.2d 1073 (1973) (“Fundamental fairness [is] the touchstone of due process. ...”).

[T]he inquiry is whether the individual has been subjected to “the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.” *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244, 4 L. Ed. 559 (1819), *quoted in County of Sacramento v. Lewis*, 523 U.S. 833, 845, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998), and *Hurtado v. California*, 110 U.S. 516, 527, 4 S. Ct. 111, 28 L. Ed. 232 (1884).

Doe v. City of Lafayette, Ind., 377 F.3d 757, 768 (7th Cir. 2004).

ZDI cannot compete in an industry where arbitrary decisions are made to limit innovations such as cash card technology. Cash card technology is readily available and is relied upon for gaming in this state. It is fundamentally unfair to permit cash card technology to limited vendors selling to tribal entities.

G. The Claims Against the State Statute and the APA Designate the Superior Court that May Hear This Case, Not the Venue Provisions of The Gambling Act.

State statutes grant ZDI the right to be heard in Pierce County Superior Court, and those statutes are not rendered inoperative by an expansive reading of RCW 9.46.095. First, the more specific provisions of the APA allow proceedings for review under that chapter to be filed in a variety of superior courts, “at the petitioner’s option.” The same is true of the claims statute, chapter 4.92 RCW. Finally, there is no basis to read the general language of RCW 9.46.095 regarding actions “done or omitted to be done” by the commission as overriding the specific provisions of these statutes that directly apply to this case. In deed, courts have read the word “jurisdiction” in a statute to mean “venue” when the context so indicates.

The Claims Statute and the APA Specifically Allow This Particular Type of Case to Be Heard in Pierce County

RCW 4.92.010 provides that any corporation having any claim against the state of Washington shall have a right of action against the

state in the superior court. The statute does not limit jurisdiction against the state to any particular county. The jurisdictional statute also contains a venue provision. RCW 4.92.010. The venue options for a plaintiff are varied and include an option for plaintiff to sue in the county of plaintiff's principal place of business. ZDI elected to file in Pierce County where its offices and legal counsel were located.

Under the statute, the State could move for transfer of venue in accordance with other statutory provisions, rules of court, or the common law. RCW 4.92.010. In the absence of a seasonable motion by the state to change venue, the case "shall" be tried in the county where plaintiff commences the action.

Defendant State never moved to transfer venue. Thus, the matter should have been tried in Pierce County. Defendant State filed a motion to dismiss the matter in its entirety. On appeal, the State asks this Court to endorse the State's violation of RCW 4.92.010. Such request violates the statutory rights of ZDI.

The APA provides additional grounds to support ZDI's right for hearing in Pierce County. The Legislature intended the APA to provide greater public and legislative access to administrative decision making. *Diel v. Western Washington Growth Management Hearings Bd.*, 153 Wn. 2d 207, 214, 103 P.3d 193 (2004). Absent specific cross reference to

other authority, the APA prevails. *Id.* In *Diel*, the APA provisions on service preempted the civil rules. The Supreme Court found the trial court erred in treating “proof of service as a jurisdictional requirement.” *Id.* at 219.

RCW 34.05.510 establishes the APA as the exclusive means of judicial review of agency action. Thus, the APA is the more specific act governing this matter. The APA grants jurisdiction in superior court and grants petitioner various options to select venue. RCW 34.05.514. ZDI opted for Pierce County.

Under the APA, the Commission has no power to preempt itself from the jurisdiction or venue provisions of the Act: “All other agencies, whether or not formerly specifically excluded from the provisions of all or any part of the Administrative Procedure Act, shall be subject to the entire act.” RCW 34.05.030. The Legislature never exempted the Commission from the APA. Thus, the APA controls. *See also Dougherty v. Dept. of L & I*, 150 Wn.2d 310, 317, 76 P.3d 1183 (2003)(declining to interpret a statute’s procedural requirements regarding location of filing as jurisdictional unless clearly mandated by statute) and *Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 43 P.3d 4 (2002) (determining plain meaning of statutory provision from all that legislature has said in statute and related statutes, which disclose legislative intent rather than

determining plain meaning from examining only the statutory provision at issue is the better approach.) When one reads all of these statutes together, one can conclude either that the Legislature intended the jurisdiction and venue provisions of the more specific statute to control when applicable, or that the word “jurisdiction” in the context of the RCW 9.46.095 was intended to refer to venue. *See, e.g. Bailiff v. Storm Drilling Co.*, 356 F.Supp. 309 (E.D. Tex. 1972)(where federal statute providing jurisdiction in actions to be in particular district “the word jurisdiction here means venue”).

To read RCW 9.46.140 (5) otherwise would raise constitutional questions. The constitution precludes amendment to a comprehensive act without setting forth the revised section in its entirety. Art. II, § 37. The Legislature never passed legislation adopting or amending RCW 9.46.095 in conjunction with amendments to RCW 34.05.514 or RCW 4.92.010. When an amendment alters the scope and effect of a separate comprehensive act without specific cross reference, the application of the amendment is invalid. *Weyerhauser v. King County*, 91 Wn.2d 721, 592 P2d 1108 (1979). In *Weyerhauser*, the court considered an amendment to the forest practices act that limited the application of the shoreline management act. The act was held invalid because it altered the scope and

effect of the shoreline management act. The Gambling Act does not preempt the APA or the Claims Against the State statute.

RCW 9.46.095 and RCW 9.46.140(5) do not apply. RCW 9.46.140(5) states the APA controls unless otherwise provided in the Gambling Act. The Gambling Act makes no reference anywhere to declaratory judgment actions under the APA or petitions for judicial review. So RCW 9.46.140(5) is not implicated. Neither is RCW 9.46.095.

ZDI filed its petition for judicial review of its declaratory action against the state. The only action that is required to be filed against the agency under the APA is an action challenging a rule. RCW 34.05.570 (2). The state is the proper party in all other actions. *Culpepper v. Snohomish Cty. Dept. of Planning*, 59 Wn. App. 166, 796 P.2d 1285 (1990). This action is not a case filed against the commission or any member thereof that would trigger RCW 9.46.095.

The plain language of RCW 9.46.095 is troubling for the state for other reasons as well. RCW 9.46.095 makes no reference to petitions for judicial review. Thus, it cannot preempt the language of the APA, which states the APA is the exclusive act governing petitions for judicial review. RCW 34.05.514.

Instead, RCW 9.46.095 has a narrow reference to an appeal from an adjudicative proceeding involving a final decision of the commission to deny, suspend, or revoke a license. That reference can be interpreted consistent with the provisions of the APA by interpreting the provision as a clarification that the preamble does not authorize individuals to file licensing actions in Superior court without exhausting administrative remedies.

With the Commission, an appeal from an adjudicative proceeding has two stages. A petitioner initially has the right to appeal the decision of the commission to the full Commission. After the full Commission enters an order, then the matter is treated as a petition for judicial review.

ZDI followed such procedure prior to filing in Superior Court. ZDI's petition for declaratory relief was initially brought before the Commission who referred it to an administrative law judge for entry of an order. Upon entry of that order, ZDI appealed to the Commission. After appearing before the Commission on appeal, ZDI petitioned for judicial review under the APA.

If the "Provided . . ." sentence of RCW 9.46.095 had been omitted, an individual may have argued the statute entitled the individual to direct relief of licensing actions in Thurston County Superior Court. Thus, the

section was never intended to limit application of the APA, but rather to assure licensing actions were first heard administratively.

RCW 9.46.095 states the APA does apply to an appeal from an adjudicative proceeding to deny a license. The Commission treated the ZDI matter as a licensing action under its own rules. WAC 230-50-010. There is no other basis than its licensing authority for the Commission to deny use of the equipment by its licensees. WAC 230-30-090. If the Commission is not licensing the equipment, what then is it doing? Approving the equipment is licensing the equipment. AR 5255. The equipment is required to have a Commission stamp to authorize its operation. AR 551-552, 295.

Pursuant to WAC 230-50-850 a declaratory order has the same status as any other order entered by the Commission in an adjudicative proceeding. The APA is the same: "A declaratory order has the same status as any other order entered in an agency adjudicative proceeding." RCW 34.05.240. Thus, ZDI's appeal is a licensing action subject to the APA under the plain language of RCW 9.46.095.

When the Legislature used the term "jurisdiction" in RCW 9.46.095, the Legislature did not intend to preempt subject matter jurisdiction in Superior Court. The Constitution assures subject matter jurisdiction in Superior Court. WASHINGTON CONSTITUTION Art. IV, § 1.

Generally, all superior courts have precisely the same subject matter jurisdiction because they have the same authority to adjudicate the same “types of controversies.” *Dougherty v. Dept. of L & I*, 150 Wn.2d 310, 317, 76 P.2d 1183, 1186 (2003). “If one superior court possesses authority to hear an appeal...there is no “jurisdictional” reason why another superior court could not also hear that appeal.” *Id.* Historically, venue provisions were argued to be “jurisdictional”; however the court reversed that logic finding venue provisions procedural, rather than jurisdictional in the strict sense. *Young v. Clark*, 149 Wn. 2d 130, 133-134, 65 P.3d 1192 (2003). The use of the word “jurisdiction” does not necessarily confer subject matter jurisdiction in a particular court. *State v. Binford*, 90 Wn.2d 370, 374, 582 P.2d 863, 866 (1978). While a statute may use the term “jurisdiction” courts commonly interpret the term to mean “venue.” *Myuskovich v. State*, 59 Wyo. 406, 141 P.2d 540 (1943). RCW 9.46.095 is not a jurisdiction statute. At best, it is a venue provision.

The Washington State Code Reviser’s Office advises in its Bill Drafting Guide that when the Legislature uses a negative subject with an affirmative, the phrase negates the obligation, but not the permission, to act: (ii) “Avoid using a negative subject with an affirmative shall, “A person may not...” is preferable to “No person shall...” The latter means that no one is required to act. So read, it negates the obligation, but not

the permission to act.” Thus, drafting rules invalidate the State’s interpretation.

The State waived its right to object to the full hearing in Thurston County. “It is the distinct preference of modern procedural rules to allow appeals to proceed to a hearing on the merits in the absence of substantial prejudice to other parties.” *Dougherty at* 319-320. The State elected to proceed to trial in Thurston County. When it appeared in Thurston County and filed its second motion to dismiss, it never raised the jurisdiction issue.

If the State believed the Pierce County decision to transfer invalid, the State should have moved to dismiss in Thurston County on jurisdictional grounds, or it should have appealed the matter directly to the Court of Appeals. It did not. Instead, the State proceeded to pursue a trial on the merits in Thurston County, which is precisely the County the State contends has jurisdiction. The State has not been prejudiced by Pierce County’s ruling.

If the State can contend this matter should be dismissed under the Gambling Act, the Commission has “plenary powers” that lack procedural safeguards to control arbitrary administrative action and abuse of discretionary power. Such all encompassing power is prohibited. The APA must preempt the Gambling Act in order to achieve the balance of

power required under the constitution. *Barry & Barry, Inc. v. Dept. of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972). The APA assures procedural safeguards for ZDI.

ZDI was prejudiced by the transfer due to the added costs associated with trial in Thurston County. ZDI respectfully requests the court award in excess of the statutory limits under the Equal Access to Justice Act to remedy the harm it has suffered due to hearing the matter in Thurston County.

H. ZDI's Fee Award Was Unfairly Limited by the Unconstitutional Legislative Caps

ZDI has incurred fees and expenses in excess of \$125,000.00 to protect its rights under the statutes. CP 769-771. The cost and fee award of less than \$25,000.00 contravenes the public policy objectives of the Equal Access to Justice Act. RCW 4.84.350.

The Legislature found that small corporations such as ZDI may be deterred from seeking review of or defending against an unreasonable agency action because of the expense involved in securing the vindication of their rights in administrative proceedings and because of the greater resources and expertise of the State of Washington. The purpose of the Equal Access to Justice Act is to ensure petitioners like ZDI have a greater opportunity to defend it from inappropriate state agency actions and to

protect its rights. RCW 4.84.340. The trial court correctly found the Commission's actions were not "substantially justified" for all of the reasons argued above.

The trial court should have calculated fees at counsel's rate of \$250.00 rather than the suggested statutory rate of \$150.00. ZDI offered the expert testimony of Paul Nordsletten CP 805-808. Attorney Nordsletten confirmed that special factors such as "the limited availability of qualified attorneys for the proceedings involved justifies a higher fee." RCW 4.84.340. Mr. Gerow testified that he could not retain counsel at the rate of \$150.00 per hour to pursue his rights. CP 770. In these matters before the Commission, counsel is forced to travel across the state. Hearings in this matter were held in Walla Walla, Yakima, Spokane, Tacoma and Olympia, which justifies the requirement for a rate in excess of the statutory recommendation.

The State failed to controvert Attorney Nordsletten's testimony. The State's reliance upon the testimony of a Rule 9 intern does not provide sufficient testimony to controvert the experts. CP 944. Fees should have been calculated at \$250.00 per hour.

With regard to the overall calculation, the trial court subtracted time spent on the State's motion to dismiss and on ZDI's motion to supplement the record. 8/17/07 VRP at 49. ZDI should not be penalized

for having asserted its right to hearing in Pierce County. As set forth previously, this matter should have been heard in Pierce County.

With regard to its motion to supplement the record, the trial court elected not to supplement the record. ZDI objects to that ruling because the complete record further supports ZDI's position. ZDI had the right to make the request pursuant to the terms of the APA. RCW 34.05.566(7). The motion was not frivolous, nor was it filed to delay or harass. The trial court never made any such findings. Thus, the time expended should be included in the final calculations. The mere fact that a court denies a motion does not make the motion unwarranted. ZDI asks this court to award the full \$25,000.00 available under the plain language of the statute. A full award under the Act is further justified by the fees expended on appeal.

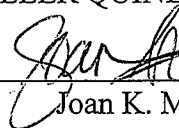
VI. CONCLUSION

Based upon the above arguments, ZDI asks this Court to affirm the trial court and increase the cost and fee award to reflect ZDI's actual costs and fees.

DATED this 14th day of March, 2008.

MILLER QUINLAN & AUTER, P.S., INC

By



Joan K. Mell, WSBA #21319

Attorney for ZDI Gaming, Inc.

CERTIFICATE OF SERVICE

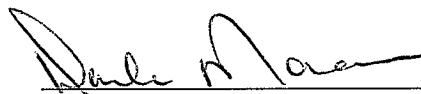
On said day below I had delivered via hand delivery by legal messenger service a true and accurate copy of the following document:
Respondent's Brief and Cross Appeal in Court of Appeals No. 36751-3
to the following:

H. Bruce Marvin
Office of the Attorney General
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
Attorney for Washington State Gambling Commission

FILED
COURT OF APPEALS
DIVISION II
08 MAR 14 PM 3:43
STATE OF WASHINGTON
BY DEPUTY

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this 14th day of March, 2008, at Fircrest,
Washington.



Darla Moran, Paralegal
Miller Quinlan & Auter, P.S., Inc.

APPENDIX 1

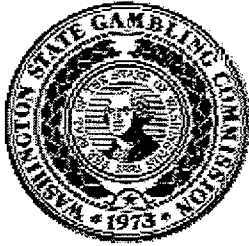
Tribal Lottery System player terminal inventory for the State of
Washington State Gambling Commission

07/13/2005

[Return to WSGC Home Page](#)

| Name | Number of Player Terminals |
|---|----------------------------|
| | 431 |
| Angel of the Winds Casino | 1156 |
| Clearwater Casino and Bingo | 122 |
| Coulee Dam Casino | 877 |
| Emerald Queen Casino (Best Western, Fife) | 304 |
| Emerald Queen Casino (Boat) | 1795 |
| Emerald Queen Casino I-5 | 673 |
| Little Creek Casino | 660 |
| Lucky Eagle Casino | 378 |
| Mill Bay Casino | 2555 |
| Muckleshoot Indian Casino | 482 |
| Nooksack River Casino | 1233 |
| Northern Quest | 178 |
| Okanogan Casino | 451 |
| Point no Point | 932 |
| Quil Ceda Creek | 396 |
| Quinault Beach Resort | 685 |
| Re...nd Casino | 308 |
| ...edars Casino | 150 |
| Shoalwater Bay Casino | 545 |
| Silver Reef | 673 |
| Skagit Valley Casino | 81 |
| Skokomish Tribe | 414 |
| Swinomish Casino | 1910 |
| Tulalip Casino | 180 |
| Tulalip Casino-Maintenance Building | 691 |
| Yakama Legends Casino | Total: 18260 |
| | |

APPENDIX 2



Rule Up For Discussion and Possible Filing

Proposed Amendment

WAC 230-14-085

Calculating markup for merchandise prizes.

| |
|--|
| ITEM 8 (c) on the March 14, 2008, Commission Meeting Agenda. Statutory Authority 9.46.070 |
| Who proposed the rule change? |
| Staff. |
| Proposed Change |
| This amendment incorporates a rule interpretation that existed since July 2005. The change clarifies that gift certificates from the licensee's own establishment are allowed as merchandise prizes, but their value must not be included in the sixty percent payout calculation. |
| Subsection (3) was changed to reflect that the total cost to the operator for the purchase of a prize must not exceed \$2,500; previously, the amount was \$750. This increase became effective in February 2008 at the request of the Washington Charitable and Civic Gaming Association. |
| History of Rule |
| This rule sets requirements for pull-tab operators to calculate mark-ups on merchandise prizes. |
| Impact of the Proposed Change |
| None. |
| Regulatory Concerns |
| None. |
| Resource Impacts |
| None. |
| Policy Consideration |
| None. |
| Statements Supporting the Proposed Rule Change |
| None. |
| Statements Opposing the Proposed Rule Change |
| None. |
| Licensees Directly Impacted By the Change |
| Pull-tab licensees. |
| Staff Recommendation |
| File for further discussion. |
| Proposed Effective Date for Rule Change |
| July 1, 2008. |

Amendatory Section:

WAC 230-14-085 Calculating markup for merchandise prizes.

- (1) To calculate sixty percent of total gross for merchandise prizes, operators take the amount actually paid for the prize and add to it no more than fifty percent of that cost as markup.
- (2) Gift certificates from a licensee's own establishment may be used as merchandise prizes for pull-tab games but must not be included in the sixty percent payout calculation.
- (3) The total cost to the operator for the purchase of a prize must not exceed ((~~seven hundred and fifty~~)) twenty-five hundred dollars.

APPENDIX 3

1
2
3
4
5
6
7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
8 IN AND FOR THURSTON COUNTY

9 Jay Gerow, an individual, and ZDI Gaming,
10 Inc., a Washington corporation,

11 Petitioners,

12 v.

13 State of Washington; the Washington State
14 Gambling Commission; Rick Day,
15 individually and in his official capacity as
16 Director of the Washington State Gambling
17 Commission; John Ellis, individually and in
18 his official capacity as a Gambling
19 Commissioner; Janice Niemi, individually
20 and in her official capacity as a Gambling
21 Commissioner; Peggy Ann Bierbaum,
22 individually and in her official capacity as a
23 Gambling Commissioner; Kevin Rojecki,
24 individually and in his official capacity as a
25 Gambling Commissioner, and Margarita
26 Prentice, individually and in her official
27 capacity as a Gambling Commissioner;

28 Respondents.

NO. 08-2-00319-9

**PETITION FOR
DECLARATORY ORDER and
OPMA COMPLAINT**

29 Mr. Gerow and ZDI Gaming, Inc. petition the Court for a declaratory order voiding
30 Washington State Gambling Commission Administrative Code 230-14-047 "Standards for
31 electronic video pull-tab dispensers" because Respondents adopted the rule in retaliation for ZDI

1 Gaming, Inc prevailing in the matter of ZDI Gaming, Inc v. The State of Washington, Thurston
2 County Superior Court Cause No. 06-2-02283-9. Such retaliation violates constitutional
3 protections of a right to petition, free speech, equal protection and due process, as well as the
4 public policy set forth in the Administrative Procedure Act and the Equal Access to Justice Act.
5 Respondents violated the Open Public Meetings Act, the Administrative Procedure Act, RCW
6 9.46.050(2) and the Regulatory Fairness Act. Respondents violated constitutional protections of
7 separation of powers through the participation and membership of legislative members on the
8 executive branch commission. Finally, Respondents adopted the rule without any evidence of a
9 regulatory benefit to its rule. Thus, Respondents' action exceeds its statutory authority and is
10 arbitrary and capricious.
11

12 I. Jurisdiction and Venue

13 1.1 The Court has subject matter and personal jurisdiction.

14 1.2 Venue is proper in Thurston County pursuant to the provisions of RCW 9.46.095
15 and 34.05.570.
16

17 II. Petitioners

18 2.1 Petitioner ZDI Gaming, Inc. is a Washington corporation licensed to do business
19 in the State of Washington and doing business across the State. It is a licensee in good standing
20 with the Washington State Gambling Commission. It is a small family owned business whose
21 net worth does not exceed \$1.5 million dollars and may have a fair market value below one
22 million dollars. ZDI is suffering financially from Respondents' misconduct and has been forced
23 to close its Tacoma office, laying off staff who have worked in the industry for more than twenty
24 years.
25
26

1 2.2 Petitioner Jay Gerow is an individual resident of the State of Washington and an
2 owner of ZDI Gaming, Inc.
3

4 **III. Respondents**

5 3.1 The State of Washington is a government entity. All acts performed by any
6 individual State actors are performed by and on behalf of the State of Washington. The
7 Washington State Gambling Commission is the State of Washington and is the agency involved
8 in the misconduct.
9

10 3.2 Respondent Day is the Director of the Washington State Gambling Commission.
11 He is named in his individual and representative capacity. Respondent Day is believed to be a
12 resident of Thurston County, Washington. All acts committed by him were done on behalf of
13 Respondent State. Any acts committed or omitted without authority are his individual
14 responsibility.
15

16 3.3 Respondent Ellis is a Washington State Gambling Commissioner. He is named in
17 his individual and representative capacity. Respondent Ellis is believed to be a resident of King
18 County, Washington. All acts committed by him were done on behalf of Respondent State. Any
19 acts committed or omitted without authority are his individual responsibility.
20

21 3.4 Respondent Niemi is a Washington State Gambling Commissioner. She is named
22 in her individual and representative capacity. Respondent Niemi is believed to be a resident of
23 King County, Washington. All acts committed by her were done on behalf of Respondent State.
24 Any acts committed or omitted without authority are her individual responsibility.

25 3.5 Respondent Bierbaum is a Washington State Gambling Commissioner. She is
26 named in her individual and representative capacity. Respondent Bierbaum is believed to be a
27

1 resident of Jefferson County, Washington. All acts committed by her were done on behalf of
2 Respondent State. Any acts committed or omitted without authority are her individual
3 responsibility.

4 3.6 Respondent Rojecki is a Washington State Gambling Commissioner. He is
5 named in his individual and representative capacity. Respondent Rojecki is believed to be a
6 resident of Pierce County, Washington. All acts committed by him were done on behalf of
7 Respondent State. Any acts committed or omitted without authority are his individual
8 responsibility.
9

10 3.7 Respondent Prentice is a Washington State Gambling Commissioner. She is
11 named in her individual and representative capacity. Respondent Prentice is believed to be a
12 resident of King County, Washington. All acts committed by her were done on behalf of
13 Respondent State. Any acts committed or omitted without authority are her individual
14 responsibility.
15

16 IV. Facts

17 4.1 On or about January 11, 2008, Respondents adopted WAC 230-14-047
18 "Standards for electronic video pull-tab dispensers." A true and correct copy of the rule is
19 attached hereto as Appendix A. This rule is in addition to WAC 230-30-097 "Approved pull-tab
20 dispensing devices" as well as the various other rules applicable to pull-tab gaming such as the
21 rules governing the standards for construction of pull-tabs, the definition of pull-tab, rules for
22 prizes and for purchasing pull-tabs, etc.
23

24 4.2 Respondents adopted the rule over the objections of multiple stakeholders
25 testifying in opposition to the rule. No one testified in favor of the rule other than the Gambling
26 Commissioner Staff who wrote the rule for Respondents. The Commission promulgated the new
27

1 rule shortly after ZDI prevailed on a petition for judicial review of the Gambling Commission's
2 rules applicable to pull-tab equipment.

3 4.3 Commissioner Rojecki and Commissioner Ellis adopted the rule without
4 identifying any regulatory benefit to the rule. There is no regulatory benefit to the rule.

5 4.4 The rule was adopted with only three of the five Commissioners present.
6 Commissioner Rojecki and Commissioner Ellis were the two votes to adopt the rule.
7 Commissioner Ellis had not been present at any of the hearings on the rule prior to its adoption.
8 RCW 9.46.050 (2) requires an affirmative vote by three or more members of the Commission for
9 all actions relating to the regulation of licensing under the Act. The Gambling Commission
10 requires ZDI to seek approval of its equipment under its licensing authority.

11 4.5 Commissioner Rojecki stated he voted for the rule because Gambling
12 Commission attorneys had advised the Commission to adopt the Staff's rule proposal to avoid
13 legal liability related to the matter of ZDI Gaming, Inc v. The State of Washington, Thurston
14 County Superior Court Cause No. 06-2-02283-9, currently on appeal in Division II from
15 Thurston County Superior Court.

16 4.5 Commissioner Rojecki disclosed prior to the public hearing on the rule that he
17 was voting in favor of the rule as a result of deliberations held prior to the public meeting.

18 4.6 Commissioner Ellis stated he voted in favor of the rule for legal reasons.

19 4.7 Commissioner Niemi voted against the rule. She acknowledged her vote at the
20 hearing would not defeat adoption of the rule. Commissioner Niemi explained that she had little
21 confidence that the courts could define a gambling device, the Gambling Commission had
22 already expanded the use of gambling equipment under the compacts, and that use of a cash card
23 on pull-tab equipment could benefit smaller jurisdictions.

1 4.8 In September 2007, when the rule was first brought before the Commission,
2 Commissioner Niemi responded to a stakeholder question inquiring why the Commission
3 thought pull-tab dispensing equipment was illegal. Commissioner Niemi's response at that time
4 was that the Commission had "gone over it" in executive session. She stated the reason for a
5 rule to make pull-tab equipment illegal was "I'll answer you with my mother answer, because I
6 said so!"
7

8 4.9 In October 2007, the proposed rule was again up for filing. Prior to the hearing,
9 Petitioners were told that the Gambling Commissioners had decided to file the rule prior to the
10 public hearing to vote on filing the rule for consideration. The reason provided for filing the rule
11 was "because of ZDI's lawsuit." At the hearing, the Gambling Commission filed the rule
12 consistent with what their decision had been prior to the meeting.
13

14 4.10 At the hearing in October 2007, the Commission directed Staff to work with
15 stakeholders without any limitations on discussions regarding cash card technology.

16 4.11 Following the October hearing, Director Day instructed Staff not to discuss cash
17 card technology with stakeholders.

18 4.12 Staff writing the amended rule instructed stakeholders and Petitioners that they
19 would have to file their own amendments to the rule to address cash card technology for pull-tab
20 prizes.
21

22 4.13 Stakeholders prepared an alternative to Staff's proposal. Staff would not agree to
23 advise the Commission that the stakeholder proposal presented neither technical nor substantive
24 issues. Staff advised no comment would be made regarding the stakeholder proposal on cash
25 card technology.
26

1 4.14 When the stakeholder's version was presented to the Commission by Staff, the
2 Commission's attorney asked Staff to advise the Commission that Staff opposed the stakeholder
3 amendment. Counsel did not ask the basis for any Staff objection, and stakeholders were never
4 given an opportunity to present Staff testimony that the stakeholder version would improve
5 regulatory control over the industry, would not expand gambling, would not make the equipment
6 a gambling device, and stakeholder's version would not cause any regulatory problems.

7
8 4.15 In December, Petitioners sent a letter to Commissioner Niemi asking the
9 Commission to direct Staff to engage in discussions over cash card technology.

10 4.16 Gambling Commission Staff responded to the letter advising that Commissioner
11 Niemi would receive the letter at the January hearing. The Commissioners and Chair Niemi
12 never responded to the request. The Gambling Commission did not convene any stakeholder
13 discussions regarding cash card technology for pull-tab prizes.

14
15 4.17 In January, at the public hearing on final adoption of Staff's rule, Petitioner
16 Gerow inquired whether Commissioner Niemi had received the letter, Commissioner Niemi
17 stated the Commission had received the letter and had discussed it. No other comment was
18 made.

19 4.18 Prior to the hearing in January, Petitioners were advised that the Gambling
20 Commissioners planned to adopt Staff's rule proposal.

21 4.19 Subsequently, consistent with the information readily available before the
22 hearing, the Gambling Commission adopted Staff's rule.

23 4.20 The Gambling Commission adopted a rule that purports to prohibit ZDI from
24 using cash card technology to transfer prizes of \$20.00 or less from the paper pull-tab to a cash
25 card at its pull-tab dispenser. The Gambling Commission ameliorates the benefits of a limited
26

1 cashier function by authorizing the purchase of pull-tabs at the equipment with a cash card, but
2 not the transfer of the monetary value of any pull-tab prize to the cash card.

3 4.21 Prior to adoption of the rule, ZDI prevailed on a petition for judicial review that
4 allows ZDI to use the cash card technology to purchase pull-tabs and to record the prize.

5 4.22 When ZDI prevailed on the petition for judicial review, the Gambling
6 Commission did not follow the order of the court and approve ZDI's equipment.

7 4.23 On or about July 24, 2007, immediately after the Trial Court issued its ruling
8 favorable to ZDI, the Gambling Commission Staff sent Mr. Gerow a letter informing him that
9 the Gambling Commission was doubling his deposit fee from \$1,000.00 to \$2,000.00 for any
10 equipment he submitted for approval.

11 4.24 On or about July 30, 2007, the Gambling Commission Staff sent a letter to ZDI's
12 competitor advising them that the Staff were proposing to change its rules to prohibit pull-tab
13 equipment such as the ZDI VIP. The Gambling Commission did not send this letter to ZDI. ZDI
14 learned of this Staff proposal from its competitor.

15 4.25 On or about August 9, 2007, the Gambling Commission Staff explained to ZDI's
16 customers at an informal Licensee Study Session that the Commission Staff was proposing a rule
17 change that would prohibit electronic pull-tab dispensing devices that have a video display,
18 which would prevent the licensees/ZDI customers from operating a VIP pull-tab dispenser.

19 4.26 On or about August 30, 2007, the Gambling Commission Staff sent letters to
20 ZDI's customers explaining that the Commission was considering prohibiting the equipment.
21 The proposal was to prohibit the equipment that had been approved for more than ten years, not
22 just the upgraded cash card terminals.

1 4.27 On or about September 13, 2007, the Director Day presented a formal proposed
2 rule to licensees in an informal session, explaining that the need for the rule was the lawsuit.
3 "One court" had decided the cash card could be used, and the Gambling Commission Staff felt
4 the Commission needed to follow the law as they understood the law to be contrary to the
5 Court's decision. So the proposal was to eliminate the machines entirely. The Gambling
6 Commission did not propose a rule to limit the use of a cash card, instead the Gambling
7 Commission deliberately and intentionally targeted ZDI by changing its rules to prohibit ZDI
8 technology entirely.
9

10 4.28 The Gambling Commission filed and adopted an amended rule without
11 consideration of the impact of the rule on small businesses. The Gambling Commission never
12 prepared a small business impact statement in contravention to RCW 19.85.900. The Gambling
13 Commission never made available any information regarding the impact of denying the use of
14 cash cards to small businesses.
15

16 4.29 The Gambling Commission Staff advised that a small business impact statement
17 was not needed because Staff's proposed amendment would not change current requirements.

18 4.30. Staff misrepresented the substantive changes to the law in its proposal. The rule
19 includes a definition of cash that never existed before and completely changes the opportunity of
20 small businesses to rely upon technology to manage its currency. Instead businesses must
21 depend upon money, which makes them particularly vulnerable to corruption when they were
22 using cash cards and could use other technology as it desired and was available.
23

24 4.31 Staff incorrectly advised that the Regulatory Fairness Act does not apply to this
25 rule. The Legislature has stated that rules that have a disproportionate impact on small
26 businesses reduce "competition, innovation, employment, and new employment opportunities".
27

1 The Regulatory Fairness Act applies equally to adoption of rules that prohibit new ideas, not just
2 old ones. If Staff were correct that the rule is merely clarifying then the rule was not needed at
3 all. Contrary to the materials prepared by Staff, the Gambling Commission clearly expressed the
4 purpose for the rule was to prevent ZDI from utilizing its cash card technology, which it was
5 permitted to do under existing rules as was affirmed by its petition for judicial review. The new
6 rule changes existing pull tab regulations. The new rule prohibits technological improvements.
7 Previously, the rules permitted innovation and development of technology that improves
8 regulatory control.

10 4.32 The rule has a significant impact on small businesses and directly curtails
11 innovation for the benefit of small businesses that the Regulatory Fairness Act establishes as the
12 policy of this State.

13 4.33 Cash card technology on pull-tab equipment that accounts for prizes of \$20.00 or
14 less on a cash card eliminates the burden on small operators to have cashiers or Staff available to
15 manually perform this function. Cash cards may improve pull-tab sales to the benefit of
16 suffering non-profits and charities.

18 4.34 The Gambling Commission was advised of this benefit in ZDI's correspondence
19 to the Commission in December.

20 4.35 Lieutenant Governor Brad Owen and the Restaurant Association advised the
21 Gambling Commission of these concerns in correspondence submitted, yet the Gambling
22 Commission made no effort to formally examine these detrimental impacts in compliance with
23 the law.

25 4.36 Commissioner Prentice attended several meetings where Staff proposed
26 prohibiting ZDI equipment and in public hearing lashed out at ZDI explaining her desire to

1 punish licensees for innovation. Commissioner Prentice is an ex-officio member of the
2 Gambling Commission and did not vote on adoption of the final rule; however her active
3 participation and clear communications of hostility towards ZDI influenced the rulemaking
4 process in violation of the separation of powers doctrine of the Washington State Constitution.
5 Commissioner Prentice is the Ways and Means Chair of the Washington State Senate. The Ways
6 and Means committee controls budget appropriations, which directly impact the constituent
7 groups employing Commissioner Rojecki.

9 4.37 Respondents have overstepped their regulatory role that was intended to regulate
10 the gambling industry in a manner that would prevent corruption yet permit communities and
11 individuals to benefit from pull-tab gaming, which has been declared a social pastime of benefit
12 to the State.

13 4.38 Respondents are prohibiting cash card technology, which is not a gambling
14 activity.

15 4.39 Respondents are prohibiting cash card technology when cash card technology is
16 admittedly of regulatory benefit to the Gambling Commission when it is used on pull-tab
17 equipment as a limited cashier function.

18 4.40 Respondents have no authority to prohibit cash card technology.

19 4.41 Respondents violated the Open Public Meetings Act by taking private action on a
20 rule.

21 4.42 Respondents never stated on the record that executive session was being
22 convened to discuss the legal implications of its proposed rule, yet clearly the Gambling
23 Commission deliberated and decided upon its course of action prior to final action on the rule.

24 4.43 Gambling Commission counsel advised Respondents to adopt the rule it adopted.

4.44 As a result of Respondents misconduct, Mr. Gerow and ZDI have been harmed. Their rights have been impaired. The rule interferes with Petitioners constitutional rights to seek redress from the courts, free speech in pursuing its right to innovate and use cash card technology, and use of its property without due process, both procedurally and substantively.

4.45 Respondents authorize the use of cash card technology for gaming activities. Respondents' rule violates principles of equal protection and creates a monopoly for licensees marketing and selling their products that use cash card technologies to tribal entities where the technology is permitted.

4.46 This matter raises an actual controversy over the application of the Administrative Procedures Act, the Open Public Meetings Act, the Regulatory Fairness Act and the authority of the Gambling Commission to prohibit cash card technology. Uncertainty necessitating resolution exists adversely affecting Petitioners and the order would not be merely an advisory opinion. The general public would not be harmed by an order in this matter. In fact, small businesses and the industry would benefit. The industry and stakeholders have consistently opposed the rule adopted by Respondents.

V. Relief Requested

5.1 An order declaring WAC 230-14-047 void in violation of the APA and RCW 9.46.050(2).

5.2 An award of attorney's fees and costs, and other relief under the Declaratory Judgments Act and the Equal Access to Justice Act.

5.3 A declaration that respondents have violated OPMA; an award of fees and costs; imposition of a penalty and indemnification by the state of any penalty imposed; and a declaration that the rule is null and void.

5.4 An order enjoining Respondents from further retaliatory acts against Petitioners.

5.5 Other relief as the Court deems fair and just.

DATED this 12th day of February, 2008.

MILLER QUINLAN & AUTER, P.S., INC.

Joan K. Mell, WSBA # 21319

Attorneys for Petitioners Jay Gerow and ZDI
Gaming, Inc

VERIFICATION

STATE OF WASHINGTON)

County of Pierce)

) ss.

I, Jay Gerow, have read the above complaint and know the contents of the same to be true and correct.

Jay Gerow

SUBSCRIBED AND SWORN TO before me this 19th day of February, 2008.

Printed Name: DARLA MORAN

NOTARY PUBLIC in and for the State of Washington, residing at: Ruston, WA 98407

My Commission Expires: 11-19-2008

